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Fresh Complaint Testimony in Massachusetts - Friend Or Foe

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FRESH COMPLAINT TESTIMONY IN MASSACHUSETTS - FRIEND OR FOE

I. INTRODUCTION

Massachusetts' laws of evidence follow a doctrine of "fresh complaint" in criminal prosecutions for rape or similar sexual attacks.[1] The doctrine of fresh complaint allows a witness to corroborate his testimony by proof that he said the same thing at an earlier time while not under oath.[2] The doctrine is designed to assist sexual assault complainants, but it may do more harm than good. Judges do not admit out of court statements made by the victim shortly after the attack as substantive proof the attack occurred, but may admit the evidence to corroborate the victim's subsequent in court statements.[3] Courts allow the admission of fresh complaint evidence because a jury may view a victim's failure to make a prompt complaint as inconsistent with the charge of rape. The rule prevents jurors from assuming that a victim did not make an immediate complaint and is therefore lying about the sexual assault.[4] The rationale for the

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[1] LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 6.18.2 (6th ed., 1994); *see, e.g.*, Commonwealth v. Sherry, 386 Mass. 682, 690-91, 437 N.E.2d 224, 229-30 (1982) (admitting into evidence victim's "fresh complaints" of rape); Commonwealth v. Moreschi, 38 Mass. App. Ct. 562, 565, 649 N.E.2d 1132, 1135 (1995) (finding fresh complaint admissible because made with reasonable promptness); Commonwealth v. Hyatt, 31 Mass. App. Ct. 488, 492, 579 N.E.2d 1365, 1368 (1991) (admitting testimony of victim's boyfriend regarding victim's rape).

[2] *See, e.g.*, Commonwealth v. Fleury, 417 Mass. 810, 813, 632 N.E.2d 1230, 1232 (1994) (allowing fresh complaint testimony admissible for corroboration only); Commonwealth v. Dockham, 405 Mass. 618, 626, 542 N.E.2d 591, 596 (1989) (considering child's age in determining admissibility of fresh complaint); Commonwealth v. Blow, 370 Mass. 401, 404, 348 N.E.2d 794, 796 (1976) (finding dispatcher's testimony not prejudicial because it reiterated victim's testimony).

[3] Commonwealth v. Bailey, 370 Mass. 388, 396, 348 N.E.2d 746, 751 (1976). In *Bailey*, the prosecution presented this evidence in the case-in-chief to prevent jurors from assuming that because the victim did not make an immediate complaint she is lying about the sexual assault. *Id.*

The fresh complaint rule permits the government to introduce out of court statements made by the victim which allege the sexual assault. *Id.* The rule acts as an exception to the general evidentiary policy that prohibits admission of prior consistent statements until after a witness has been impeached on cross-examination because it permits admission of fresh complaint evidence in the prosecution's case-in-chief. Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 469 (1996) [hereinafter *The Paradox*] (focusing on the potential harm of fresh complaint evidence).

[4] *Bailey*, 370 Mass. at 392, 348 N.E.2d at 749.

doctrine is that a woman who is a "true sexual assault victim" would file a complaint immediately.[5] Such evidence is admissible to show that the victim behaved like a "true sexual assault victim."[6]

A fresh complaint witness may testify only to details included in the victim's testimony.[7] The fresh complaint witness should not provide the jury with additional details not already described by the victim.[8] The majority of jurisdictions admit only the fact that a victim made the complaint.[9] Others, however, reveal details of the complaint despite purporting to only admit the fact of the complaint.[10] For instance, a court may admit details of the complaint as

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[5] *The Paradox, supra* note 3, at 442.

[6] *The Paradox, supra* note 3, at 442. A "true sexual assault victim," for purposes of this article, is one that was, in fact, raped. The fresh complaint rule endorses the rationale that the testimony of sexual assault victims is inherently suspect. Commonwealth v. Dion, 30 Mass. App. Ct. 406, 412, 568 N.E.2d 1172, 1176 (1991). The rule illustrates the need for corroboration because a jury may conclude that if the victim did not complain immediately after the assault, her testimony represents a recent fabrication. *Id.* at 412-13, 568 N.E.2d at 1176.

[7] *See Bailey*, 370 Mass. at 392, 348 N.E.2d at 749 (admitting details of fresh complaint as evidence). "The whole of the statement . . . including details, is admissible." *Id. (*quoting Glover v. Callahan, 299 Mass. 55, 58, 12 N.E.2d 194, 196 (1937)). In the Commonwealth, and a few other jurisdictions, the rule provides that details of the complaint are admissible. *Id. But see* Commonwealth v. Lavalley, 410 Mass. 641, 644 n.4, 574 N.E.2d 1000, 1003 n.4 (1991) (noting that the majority of jurisdictions have held details of the complaint inadmissible).

[8] *See* Commonwealth v. Flebotte, 417 Mass. 348, 351, 630 N.E.2d 265, 267 (1994) (limiting scope of fresh complaint testimony to events raised during testimony of victim). Fresh complaint testimony is not hearsay, because it is not offered for the truth of the matter asserted. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 8.1 (6th ed. 1994). In Liacos' Handbook of Massachusetts Evidence, Fed. R. Evid. 801 (c) and Proposed Mass.R.Evid. 801 (c) define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* Both rules define a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *Id.*

[9] *See, e.g.*, State v. Grady, 183 N.W.2d 707, 716 (Iowa, 1971) (holding that allowing witness to testify to fact of complaint does not violate hearsay rule); 4 J. WIGMORE, EVIDENCE § 1136, at 307-10 n.1 (listing states that allow details of complaint); P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 6.18.2 (6th ed. 1994) (explaining why admitting fresh complaint does not violate hearsay rule).

[10] *See* State v. Purvis, 157 Conn. 198, 202-08, 251 A.2d 178, 182-83 (1968); State v. Crissman, 31 Ohio Op. 2d 170, 287 N.E.2d 642 (County Ct. App. 1971); Dunn v. State, 45 Ohio St. 249, 251, 12 N.E.2d 826, 827 (1987).

an excited utterance.[11] Further, if the defense attorney impeaches the complainant, the government may use prior consistent statements to corroborate the complainant's testimony, allowing introduction of the details of the fresh complaint.[12]

The flexibility of Massachusetts courts in admitting fresh complaint testimony allows the jury to draw their own conclusions as to whether the fresh complaint corroborates the victim's testimony. It also allows the defendant an opportunity to demonstrate discrepancies between the testimony of the witness and the victim.[13] By admitting the details of the complaint as corroborative evidence, a jury can make its own determination of credibility based on the consistencies or discrepancies between the testimony of the complainant and witness.[14]

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[11] The term "excited utterance" is used in the text of this discussion, however, such statements are also referred to as "spontaneous utterances" or "spontaneous declarations." Commonwealth v. Grant, 418 Mass. 76, 80, 634 N.E.2d 565, 568 (1994).

> The . . . exception to the hearsay rule is based on the experience that, under certain circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties . . . so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . and may therefore be received as testimony to those facts.

Id. at 80-81, 634 N.E.2d at 568-69 (quoting Commonwealth v. McLaughlin, 364 Mass. 211, 222, 303 N.E.2d 338, 346 (1973)).

[12] Commonwealth v. Bailey, 370 Mass. 388, 392 n.2, 348 N.E.2d 746, 749 n.3 (1976). "A prior statement of a witness concerning a material fact that is consistent with his testimony at trial may be admitted on redirect in limited circumstances: to rehabilitate him after impeachment on a claim that his testimony is a recent contrivance or the product of animus or bias." *Id.* Prior consistent statements are admissible by some courts to rebut a showing that an inconsistent statement was made. *Id.; see* Commonwealth v. Zukoski, 370 Mass. 23, 26, 345 N.E.2d 690, 693 (1976) (noting exception to general rule that prior consistent statements of witness inadmissible).

[13] *See* Commonwealth v. Flebotte, 417 Mass. 348, 349, 630 N.E.2d 265, 266 (1994) (holding fresh complaint testimony admissible because it exceeded scope of victim's testimony); Commonwealth v. Scanlon, 412 Mass. 664, 671, 592 N.E.2d 1279, 1284 (1992) (holding police officer's referral to penetration exceeded limits of fresh complaint testimony).

[14] *Bailey,* 370 Mass. at 396, 348 N.E.2d at 751. "[I]f the testimony about the complaint does differ from the victim's own testimony, then the rule admitting details might provide a marginal advantage to the defendant, since he could use the discrepancy to discredit the victim." *Id.*

If both the victim and the witness testify to the same details, using the exact same words and descriptions, a jury may find the testimony scripted and planned, calling for closer scrutiny of the alleged complaint. If a victim's story originally seems far fetched or outrageous, corroborative fresh complaint testimony may assist the prosecution.

The flexibility of Massachusetts courts, however, is now threatened. As the court noted in *Commonwealth v. Lavalley*,[15] the "piling on" of fresh complaint testimony supporting the complainant may give an impression to the jury that the crime must have actually occurred.[16] The court's holding signals an end to the expansive use of fresh complaint testimony to bolster the complainant's credibility.[17] Rather the opinion invites parties in future cases to give courts an opportunity to reassess the admissibility of fresh complaint testimony.[18] In *Commonwealth v. Licata*,[19] the court allowed the prosecution to introduce fresh complaint evidence including details of the alleged victim's statement.[20] Despite admitting the details of the alleged victim's statement, the court warned trial judges to use fresh complaint testimony cautiously.[21] The court held that if the admission of details creates a prejudicial effect "by inciting a jury through a needless rehearsal of the particulars of a gruesome crime," a judge may limit the testimony.[22] To preserve justice, the *Licata* court detailed the judge's role of

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[15] 410 Mass. 641, 574 N.E.2d 1000 (1991). In *Lavalley*, the court maintained that it stood ready to reconsider the rule that permits the prosecution to offer evidence of the details of the victim's out of court statements, not simply the fact that the victim did complain. *Id.* The court in *Lavalley* affirmed the defendant's conviction, finding the fresh complaint testimony "cumulative and not prejudicial to the defendant." *Id.* The court did, however, take this opportunity to warn trial judges about fresh complaint evidence: "This case . . . raises serious questions regarding the continued viability of a rule which allows the Commonwealth to introduce details of fresh complaint during a case-in-chief as a way of corroborating the victim's in-court testimony. . . ." *Id.* at 646, 574 N.E.2d at 1003-04.

[16] *Id.* at 646, 574 N.E.2d at 1004.

[17] *Lavalley*, 410 Mass. at 646, 574 N.E.2d at 1004 (inviting future prosecutors and defense attorneys to provide court with memorandums of law focussing on fresh complaint rule)

[18] *Id.* (expressing reservations about maintaining rule which permits prosecution to introduce details of fresh complaint).

[19] 412 Mass. 654, 591 N.E.2d 672 (1992).

[20] *Id.* at 658, 591 N.E.2d at 674.

[21] *Id.* at 659, 591, N.E.2d at 675.

[22] *Id.; see also* Commonwealth v. Blow, 370 Mass. 401, 406, 348 N.E.2d, 794, 797 (1976) (cautioning trial judges not to allow inflammatory repetition of complaint to jury); Commonwealth v. Bailey, 370 Mass. 388, 397, 348 N.E.2d 746, 751 (1976) (expressing concern that repetitive testimony from several witnesses regarding details of complaint may lend undue credibility to victim).

instructing the jury on the limited corroborative, non-substantive function of fresh complaint testimony.[23] The judge must give fresh complaint instructions not only when he admits the fresh complaint evidence but also with final instructions.[24] The court reasoned that when a judge limits a witness' testimony, the jury must rely on that witness' interpretation of the victim's statements.[25]

Despite the dicta in *Lavalley,* fresh complaint testimony remains admissible in Massachusetts. Courts admit only details to which the victim testifies to generally as corroboration by way of a prior fresh complaint.[26] The judge's failure to instruct the jury on the corroborative purposes of fresh complaint testimony creates a "substantial risk of miscarriage of justice" and warrants a new trial.[27] Without instruction, a jury might mistakenly consider the fresh complaint testimony as substantive evidence instead of mere corroborative evidence.[28]

The effect of the judge's failure to instruct the jury on the exclusive corroborative function of fresh complaint testimony hinges solely on the

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[23] Commonwealth v. Licata, 412 Mass. 654, 660, 591 N.E.2d 672, 675 (1992).

[24] *Id.*

[25] *Id.*

[26] *See Licata,* 412 Mass. at 659 n.8, 591 N.E.2d at 675 n.8 (1992). *But see* Commonwealth v. Martins, 38 Mass. App. Ct. 636, 638, 650 N.E.2d 821, 823 (1995) (arguing police officer's fresh complaint testimony went beyond scope of victim's direct testimony). In *Martins,* the victim testified that a group of boys and girls dragged her to a park where she was forced to perform degrading acts, including performing oral sex on one of the co-defendants. *Id.* Victim also testified that the group took her to an abandoned apartment where she was forced to perform oral sex on another co-defendant. *Id.* The Defendant challenged police office's testimony that the victim said the boys "enjoyed" the attack, stood around cheering and prevented the victim from escaping. *Id.* The court held this fresh complaint testimony was not erroneously admitted. *Id.* "Those details were largely corroborative of the victim's testimony and those portions that were at variance did not fill gaps in or materially strengthen the prosecution's case. *Martins,* 38 Mass. App. Ct. at 639, 630 N.E.2d at 823.

[27] *See* Commonwealth v. Trowbridge, 36 Mass. App. Ct. 734, 745, 636 N.E.2d 291, 298 (1994) (ordering new trial because of judge's failure to define corroborate); Commonwealth v. Almon, 30 Mass. App. Ct. 721, 725, 573 N.E.2d 529, 532 (1991) (holding that judge's failure to instruct jury created substantial risk of miscarriage of justice).

[28] Commonwealth v. Licata, 412 Mass. 654, 657 n.6, 591 N.E.2d 672, 674 n.6 (1992). A jury must know the difference between corroborating evidence and substantive evidence. *Almon,* 30 Mass. App. Ct. at 725, 573 N.E.2d at 532. To corroborate "is to strengthen" or "add weight or credibility to a thing by additional or confirming facts or evidence." BLACK'S LAW DICTIONARY 344 (6th ed. 1990). Substantive evidence, on the other hand, is evidence "adduced for the purpose of proving a fact in issue." *Id.* at 1429.

circumstances of the trial.[29] Reversal is not *per se* required when a judge does not properly instruct a jury on the fresh complaint doctrine.[30]

II. WHEN IS A COMPLAINT FRESH?

A trial judge has the discretion to present the preliminary question of whether a complaint is sufficiently "fresh" to the jury.[31] The judge instructs the jury that they are to evaluate the promptness of the complaint before considering the testimony.[32] If the jury does not find the complaint to be reasonably prompt, they must disregard the witness' testimony completely.[33]

Courts have not set a threshold for timeliness of an admissible complaint; no law exists regarding the time within which a sexual assault victim must first make a complaint in order for it to be admissible.[34] In cases involving the sexual abuse of a child, the fresh complaint doctrine is particularly flexible because courts do not require a prompt complaint.[35] Courts have taken a flexible view of what constitutes a reasonably prompt complaint because they recognize the "shame, fear, intimidation, [and] guilt" that children experience.[36] The court determines "freshness" by discerning reasonableness of the victim's actions under the particular circumstances of the case.[37]

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[29] *See Almon*, 30 Mass. App. Ct. at 726, 573 N.E.2d at 532 (finding judge's failure to instruct jury does not always require reversal, but rather depends on facts of case).

[30] *Id.*

[31] Commonwealth v. Montanino, 409 Mass. 500, 508, 567 N.E.2d 1212, 1216 (1991).

[32] *Id.* at 511, 567 N.E.2d at 1217.

[33] *Id.*; *see also* Commonwealth v. Dion, 30 Mass. App. Ct. 406, 414, 568 N.E.2d 1172, 1177 (1991) (holding eighteen months not reasonable when evidence of threats or intimidation not found).

[34] Commonwealth v. Amirault, 404 Mass. 221, 228, 535 N.E.2d 193, 198 (1989).

[35] *See* Commonwealth v. Fleury, 417 Mass. 810, 815, 632 N.E.2d 1230, 1233 (1994) (allowing fresh complaint testimony given twenty-one months after sexual abuse occurred into evidence); *Amirault*, 404 Mass. at 229, 535 N.E.2d at 199 (holding that completely different version of fresh complaint doctrine applies to child victims of sexual abuse). *But see Montanino*, 409 Mass. at 508, 567 N.E.2d at 1217 (holding fresh complaint testimony given four years after sexual abuse occurred inadmissible).

[36] Commonwealth v. Hyatt, 31 Mass. App. Ct. 488, 491, 579 N.E.2d 1365, 1367 (1991). "The victim who acknowledges her experience as rape but anticipates poor treatment from an ill-informed community may not report and may or may not seek care." MARY P. KOSS & MARY R. HARVEY, THE RAPE VICTIM 91 (Judith Hunter ed., Sage Publications 1991) [hereinafter THE RAPE VICTIM].

[37] *Fleury*, 417 Mass. at 814-15, 632 N.E.2d at 1233 (1994).

In cases of sexual abuse of children, the court considers several factors in the determination of "freshness."[38] These include the child's age, the length of time the child-victim is away from the abusive setting, whether the perpetrator is a relative or close friend of the child, the emotions of fear and potential embarrassment, and whether the defendant held a position of trust in the victim's life.[39] Furthermore, with young victims, the court measures promptness of the complaint from the time the victim leaves the accused's control.[40]

Although the trial judge initially determines whether the complaint was reasonably prompt to constitute a fresh complaint, the jury ultimately determines if the complaint is fresh enough to be believed.[41] Freshness determination varies and is flexible.[42]

III. THE DEVELOPMENT OF THE FRESH COMPLAINT DOCTRINE

The fresh complaint doctrine traces back to the common law doctrine of

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[38] Commonwealth v. Dockham, 405 Mass. 618, 626, 542 N.E.2d 591, 596 (1989).

[39] *Id.*

[40] Commonwealth v. Comtois, 399 Mass. 668, 673 n.9, 506 N.E.2d 503, 506 n.9 (1987). In Comtois, the child victim complained that her stepfather had sexually abused her approximately nine months after the stepfather allegedly raped the child. *Id.* Despite the nine month period of silence, the court recognized the child was still in fear of her stepfather as he held a position of trust in the family (arguably) and actually lived under the same roof as the child, possibly causing fear, shame or embarrassment. *Id.* The court admitted the child's fresh complaint into evidence and the stepfather was convicted of rape and abuse of a child under the age of sixteen. *Id.* at 669, 506 N.E.2d at 504.

[41] Commonwealth v. Montanino, 409 Mass. 500, 510, 567 N.E.2d 1212, 1217 (1991).

[42] *See generally Montanino*, 409 Mass. at 508, 567 N.E.2d at 1217 (1991) (maintaining four years not "fresh" absent evidence victim was threatened or intimidated); Commonwealth v. Lafave, 407 Mass. 927, 939, 556 N.E.2d 83, 91 (1990) (finding eighteen months reasonably prompt when victim made complaint after she left coercive atmosphere); Commonwealth v. Snow, 35 Mass. App. Ct. 836, 841, 626 N.E.2d 888, 890 (1994) (holding six years not sufficiently prompt when no evidence defendant threatened victim); Commonwealth v. Clements, 36 Mass. App. Ct. 205, 214, 629 N.E.2d 361, 370 (1994) (disallowing complaints made two years after incidents and twenty months after defendant ceased controlling victims); Commonwealth v. Gardner, 30 Mass. App. Ct. 515, 527, 570 N.E.2d 1033, 1044 (1991) (rejecting complaint made thirty eight months after abuse occurred where no evidence of threats or control); Commonwealth v. *Hyatt*, 31 Mass. App. Ct. 488, 494, 579 N.E.2d 1365, 1368 (1991) (finding that twenty one months reasonably prompt when victim concerned about ruining her sister's life).

"hue and cry."[43] Old English law required the victim of a felony to alert his or her community that a crime occurred.[44] All who heard this outcry were obliged to join in the pursuit of the felon, until the "malefactor was taken."[45] To prove his case, a prosecutor had to show that the alleged victim made a complaint.[46] The doctrine of "hue and cry" applied to felonies, murders, robberies and rapes.[47] Due to the sensitive nature of rape, the doctrine of "hue and cry" served two purposes: to assist in the apprehension of the criminals and to force the victims of rape to publicly declare their injury.[48] In essence, this doctrine gave women who were raped two options.[49] The woman could report the rape, and be treated with scorn and disbelief, or she could keep the rape a secret, and hide feelings of shame.[50] It is to be noted that rapes are often not reported because victims of sexual assault experience feelings of shame and embarrassment.[51]

As the hearsay rule developed in Old English law, courts eventually abandoned the "hue and cry" requirements.[52] Despite this abandonment, courts continued to admit evidence of fresh complaint in cases of rape and sexual assault.[53] The notion of a fresh complaint doctrine in Massachusetts' courts dates back to Chief Justice Holmes' opinion in *Commonwealth v. Cleary*[54] where the court recognized the abandonment of the ancient requirement of hue

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[43] *See* Commonwealth v. Lavalley, 410 Mass. 641, 647 n.7, 574 N.E.2d 1000, 1004 n.7 (1991) *citing* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE EDWARD I, 576-77 (1895) (explaining history of the fresh complaint rule).

[44] *Id.*

[45] *Id.*

[46] *Id.* "Proof that a complaint was made became a necessary element of the prosecution's case." *Id.*

[47] *See* Lavalley, 410 Mass. at 647 n.7, 574 N.E.2d at 1004 n.7 (1991) *citing* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE EDWARD I, 576-77 (1895).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *See generally* THE RAPE VICTIM, *supra* note 36, at 91 (noting factors contributing to under-reporting, including embarrassment, fear of further inquiry, and fear of court procedures).

[52] *Lavalley,* 410 Mass. at 647 n.7, 574 N.E.2d at 1004 n.7.

[53] *Id.*

[54] Commonwealth v. Cleary, 172 Mass. 175, 177, 51 N.E.2d 746, 746 (1898).

and cry.[55] Relying on British decisional law, American courts utilized the doctrine of fresh complaint and allowed the government to include details of a fresh complaint in its original case.[56] Justice Holmes stated that fresh complaint testimony is "not admitted as part of the "res gestae," or as evidence of the truth of the things alleged, or solely for the purpose of disproving consent, but for the more general purpose of confirming the testimony of the ravished woman."[57]

IV. THE FRESH COMPLAINT DOCTRINE TODAY

The crime of rape is often the most difficult to prove, especially if the perpetrator admits to sexual intercourse but denies the use of force. If a defendant uses consent of the victim as a defense, it is the victim's word against the alleged perpetrator's. Rape victims initially confront considerable skepticism from police, prosecutors and the community at large.[58] Corroboration is, therefore, that much more important.[59] Obtaining corroborative evidence of rape is more difficult to secure than for many other crimes.[60] In the case of larceny, for example, the requirement of corroboration may easily be met: the police arrest the defendant with the stolen goods in his possession.[61] Likewise, in cases involving illegal substances, there is often both physical evidence (the substances or drug paraphernalia) and surveillance recordings.[62] These procedures, however, rarely apply to rape cases because rape is distinct from other crimes as, typically, there are no witnesses.[63] Although medical testing can establish penetration, it cannot prove nonconsent and may not prove whether the

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[55] *Id.* at 176, 51 N.E.2d at 746. "The rule that in trials for rape the government may or must prove that the woman concerned made a complaint soon after the commission of the offence [sic] is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal." *Id.*

[56] *Id.*

[57] *Id.* at 176-77, 51 N.E.2d at 746. Certain courts have reversed convictions due to lack of corroboration. *See* Alison v. United States, 409 F.2d 445, 450 (1969) ("If this testimony were corroborated it would surely support a jury finding that, beyond a reasonable doubt, appellant entertained the intention to carnally know the prosecutrix").

[58] SUSAN ESTRICH, REAL RAPE 21 (President and Fellows of Harvard College ed., Harvard University Press 1987).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] REAL RAPE, *supra* note 58, at 21.

[63] REAL RAPE, *supra* note 58, at 21.

alleged rape involved the accused.[64]

Due to the difficulty of gathering corroborative evidence of rape and sexual assault, admitting the testimony of fresh complaint witnesses remains important in prosecuting offenders. At trial, juries are more likely to disbelieve or discredit the victim's testimony without evidence of fresh complaint.[65] This trend demonstrates how society may treat rape victims with unwarranted skepticism.[66]

Courts historically justifies the admission of fresh complaint testimony by applying "a tortuous, sexist reasoning," specifically that victims of rape naturally speak with others about the attack.[67] Yet, a court's presumption that rape victims naturally speak to others about their sexual assault maybe considered both sexist and inaccurate.[68] Unfortunately, judges may still rely on this presumption when admitting fresh complaint evidence.[69]

Although Massachusetts courts attempt to temper jurors' skepticism of rape victims by admitting fresh complaint testimony, the courts may have actually contributed to or even increased society's skepticism of rape victims. The fresh complaint doctrine originates from the idea that every rape victim would immediately accuse the wrongdoer, publicly and vocally, when in fact, "due to social stigma and skepticism which victims of rape often confront, the

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[64] REAL RAPE, *supra* note 58, at 21 (stating usefulness of medical testing depends on multitude of factors, including prompt and appropriate treatment by police and medical personnel). The usefulness and availability of medical corroboration not only depends on a multitude factors but also relies on the victim's not doing what reports have found to be the most common immediate response of rape victims: bathing, douching, brushing her teeth, gargling, waiting to report, if at all. *Id.* Corroboration is often impossible in cases of rape. *Id.*

[65] LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE 93 (Lexington Books ed., Macmillan, Inc.) (1989).

[66] *Id.*

[67] *See* Commonwealth v. Lavalley, 410 Mass. 641, 647 n.7, 574 N.E.2d 1000, 1004n.7 (1991), *citing* Baccio v. People, 41 N.Y. 265, 268 (1869) (finding it "natural and inevitable that a woman who has been raped will make immediate complaint"); State v. Neel, 60 P. 510, 511, 21 Utah 151, 152 (1900) (stating it is the "natural instinct" of women who have been raped to immediately report).

[68] *Lavalley*, 410 Mass. at 647, 574 N.E.2d at 1004. "The irony lies in the fact that the Court's professed concern about perpetuating a doctrine with sexist roots has led it to signal that it may be ready to adopt a rule that will, in practice, make it more difficult for rape prosecutions to succeed." Diane Kottmyer and Martin Murphy, *Developments in Criminal Law: The Changing Face of Rape Prosecutions*, 36 JUN. B. B.J. 31, 35 (May/June 1992).

[69] *See Lavalley*, 410 Mass. at 643-44, 574 N.E.2d at 1002-03, (finding details of complaint necessary to counteract "considerable and perhaps inordinate skepticism in rape cases").

opposite may be true."[70] In courts applying the common law, the absence of fresh complaint appears to prove that a rape did not, in fact, occur.[71]

A failure of the victim to make a complaint soon after the occurrence, may cast serious doubt on the merits of the charge.[72] The absence of a fresh complaint creates a strong, but rebuttable presumption that the woman was not raped.[73] Statistics on unreported rape suggest that not all rape victims make a fresh complaint or report the rape at all.[74] Rape is unique not because of the number of actual complaints but because of the disproportionate number of cases in which rape victims do not report the crime.[75] The fresh complaint doctrine does not acknowledge that legitimate reasons exist for the absence or delay in reporting rape.[76] In light of the "social stigma and skepticism" which victims of rape often face, it is ironic that the public expects the rape victim to

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[70] *Lavelly*, 410 Mass. at 647 n.7, 574 N.E.2d at 1004 n.7. As a Minnesota Supreme Court Justice stated in 1965, "[i]t is human nature to incline to the story of a young girl. But, while virtue and veracity are the rule with them, yet even young girls, like older females, sometimes concoct an untruthful story to conceal a lapse from virtue." State v. Anderson, 272 Minn. 384, 386, 137 N.W.2d 781, 782 (1965).

[71] *Anderson*, 272 Minn. at 386, 137 N.W.2d at 782; *see also* Fitzgerald v. United States, 443 A.2d 1295, 1303 (D.C. 1982) (holding fresh complaint testimony admissible to corroborate in order to counter possible charges of fabrication).

[72] Glover v. Callahan, 299 Mass. 55, 57, 12 N.E.2d 194, 196 (1937). The *Piccerillo* court held it was proper for a jury to consider the fact that an alleged victim did not make a fresh complaint when weighing the credibility of her testimony. *Piccerillo*, 256 Mass. at 491, 152 N.E.2d at 747.

[73] *Glover*, 299 Mass. at 57, 12 N.E.2d at 196. If an alleged victim does not offer satisfactory reason to the court for failing to make a complaint, her entire testimony may be discredited. The rule of fresh complaint, in the words of one court, "is founded upon the laws of human nature. It is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint." State v. Connelly, 57 Minn. 482, 485, 59 N.W. 479, 481 (1894).

[74] GARY E. MCCUEN, CRIMES OF GENDER: VIOLENCE AGAINST WOMEN 56-58 (Gary E. McCuen Publications, Inc. 1994).

[75] *Id.* According to statistics from a study conducted by Kent State University psychologist Mary P. Koss funded by a grant from the National Center for the Prevention and Control of Rape, fifty-two percent of all women surveyed have experienced some form of sexual victimization. http://pubweb.ucdavis.edu/Documents/RPEP/kass.htm. An estimated fifteen to forty of women are victims of attempted or completed rape during their lifetime. *Id.* Victimization researchers have found that rape is under reported. *Id.* Researchers estimate that more than ninety of rape victims do not report the crime to the police. *Id.* "Knowledge and fear of ill-treatment by police officers, court officials, and medical and mental health providers contribute heavily to a victim's reluctance to report." THE RAPE VICTIM, *supra* note 36, at 91.

[76] REAL RAPE, *supra* note 58, at 21.

speak out about her attack shortly after it occurs.[77]

V. CONCLUSION

The admissibility of fresh complaint testimony acts a double-edged sword. If admissible, the testimony may bolster the complainant's credibility, increasing the chance of conviction. But if inadmissible, the victim may be disadvantaged. Disallowing fresh complaint testimony will have the effect of making trials more difficult for the victim. In some cases, for example, the complainant's testimony will be the sole evidence for the jury. This forces the defense to work harder to place the complainant's testimony in doubt. As a result, the defense attorney may subject the complainant to closer investigation, and possibly, a more grueling and rigorous cross examination.

By allowing fresh complaint testimony into evidence, defendants may also be disadvantaged. Potential jurors may consider the fresh complaint testimony as substantive evidence and give the testimony of the victim more weight than it deserves. More importantly, courts may be sending a message to society that without such corroboration, sexual abuse and rape victims can not be believed.

Massachusetts' unique treatment of fresh complaint testimony, allowing both the fact of the complaint and the details of the complaint, is problematic. What is the solution? Massachusetts would alleviate certain problems if it followed the majority jurisdictions and allowed only the fact of the complaint to be admissible. For example, the complainant would no longer "pile on" fresh complaint witnesses in order to bolster her credibility.

Massachusetts courts allow the details of the fresh complaint to be admissible in order to counter the existing skepticism that a jury may feel toward rape or sexual abuse victims. However, this becomes troublesome for those rape victims who do not make any complaint, fresh or otherwise, of the crime. By allowing the details of the fresh complaint to be admissible, courts' assume that those victims who complain of rape are actual rape victims, while those who do not make a complaint consented to the sexual activity.

The existing doctrine is both helpful and harmful to the rape victim. There is no one natural reaction for a "true victim." Victims react in different ways. What may be natural for one victim may not be for the next. Fresh complaint testimony allows the jury to see the victim in a more favorable, credible light.

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[77] Commonwealth v. Lavalley, 410 Mass. 641, 647 n.7, 574 N.E.2d 1000, 1004 n.7 (1991); *see also* Commonwealth v. Licata, 412 Mass. 654, 657, 591 N.E.2d 672, 674 (1992). "It is not difficult to understand a rape victim's reluctance to discuss with others, particularly strangers, the uncomfortably specific details of a sexual attack. Additionally, a victim must endure the '[s]uspicion and disbelief' with which society greets those who allege sexual assault." *Id.*

However, by showing that a victim properly complained, the doctrine reinforces sexual myths about rape victims that equate promptness with veracity.

Massachusetts courts should limit fresh complaint testimony to the fact that the alleged victim made a complaint, and exclude all other potentially bolstering details. This solution is fair. With this compromise, "piled on" testimony cannot unfairly prejudice a defendant. But more importantly, it would send a message that not the rape victims report being raped or make a fresh complaint.

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